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No. 87-168

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

Russell Frisby, et al.,

Appellants,

v.

Sandra C. Schultz, et al.,

Appellees.

On Appeal From the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR APPELLANTS

Harold H. Fuhrman
Counsel of Record
710 N. Plankinton Ave.
Suite 440
Milwaukee, WI 53203
(414) 276-0560

George A. Schmus
10701 W. National
West Allis, WI
53227
(414) 321-1400

Attorneys for Appellants

QUESTIONS PRESENTED

1. Whether this Court has appellate jurisdiction over a case in which the district court granted a preliminary injunction and would have granted a permanent injunction had there been no appeal or trial, and the appellate court affirmed the district court and remanded the case.

2. Whether § 9.17 of the Town of Brookfield General Code, which prohibits picketing in residential areas in order to preserve safety and privacy, is a reasonable regulation of speech in a nonpublic forum.

3. In the alternative, whether the ordinance is a constitutional time, place, and manner regulation of speech in a full public forum.

PARTIES

Other defendants below and appellants in this Court are George H. Hunt, Robert Wagowski, Harlan Ross, Clayton A. Cramer, and the Town of Brookfield.

The other plaintiff below and appellee in this Court is Robert L. Braun.

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Wisconsin, granting the motion of appellees (hereinafter "the picketers") for a preliminary injunction is reported as Schultz v. Frisby, 619 F. Supp. 792 (E.D. Wis. 1985)(Jurisdictional Statement at A-3. Appellants (hereinafter "the Town") appealed, and a panel of the U.S. Court of

Appeals for the Seventh Circuit affirmed. Schultz v. Frisby, 807 F.2d 1339 (7th Cir. 1986)(JA-147). The court of appeals vacated the panel decision and granted a rehearing en banc. Schultz v. Frisby, 818 F.2d 1284 (7th Cir. 1987)(Jurisdictional Statement at A-2). The Seventh Circuit, sitting en banc, then affirmed the judgment of the district court, by an equally divided court and without a published opinion. Schultz v. Frisby, 818 F.2d 33 (7th Cir. 1987)(Jurisdictional Statement at A-1).

JURISDICTION

This is an appeal from a judgment order of the Seventh Circuit Court of Appeals dated April 30, 1987, that affirmed the judgment of the District Court for the Eastern District of Wisconsin and remanded the case to that court. Jurisdiction in the court of appeals was based on 28 U.S.C. § 1292(a)(1). The district court order was filed on October 7, 1985. Jurisdiction in that court was based on 28 U.S.C. § 1343. The district court granted a

preliminary injunction enjoining appellants from enfo cing an ordinance of the Town of Brookfield because the ordinance was likely to fail the test of a constitutional time, place, and manner regulation of speech in a public forum (Jurisdictional Statement at A-22). A panel of the appellate court originally heard the case and issued an opinion reported at 807 F.2d 1339 (7th Cir. 1986)(JA-85). The court then vacated that opinion and granted a rehearing en banc. Schultz v. Frisby, 818 F.2d 1284 (7th Cir. 1987)(Jurisdictional Statement at A-2). After rehearing, an evenly divided court affirmed the district court order without opinion (Jurisdictional Statement at A-1).

A notice of appeal to this Court (Jurisdictional Statement at A-24) was filed on July 16, 1987 with the clerk of the Seventh Circuit Court of Appeals and the clerk of the District Court for the Eastern District of Wisconsin. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2), because the

district court found the ordinance was likely to be found unconstitutional. A municipal ordinance is considered a state statute for the purposes of 28 U.S.C. § 1254(2). City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976). On January 11, 1988, this Court ordered that further consideration of the question of jurisdiction would be postponed to the hearing of the case on the merits.

STANDARD OF REVIEW

In this case virtually all of the facts were undisputed (see JA-16 to JA-17), thus the district court's decision was based on points of law. Because the district court's errors of law are the subject of this appeal, plenary review by this Court is appropriate. See Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S. Ct. 2169, 2177 (1986).

CONSTITUTIONAL AND ORDINANCE PROVISIONS

The first amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . .

U.S. Const. amend. I.

The fourteenth amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Section 9.17, General Code, Ordinances of Town of Brookfield provides in pertinent part:

> (2) PICKETING RESIDENCE OR DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

Town of Brookfield, Wis., General Code, Ordinances § 9.17 (1985). The entire text of the ordinance is set forth at page A-26 of the Jurisdictional Statement.

STATEMENT OF THE CASE

Between April 20 and May 20, 1985, appellees Sandra Schultz and Robert Braun, together with groups of other antiabortion

demonstrators, picketed the home of Dr. Benjamin Victoria (Jurisdictional Statement at A-5 to A-6). Dr. Victoria apparently performs abortions as part of his medical practice in the cities of Appleton and Milwaukee (Jurisdictional Statement at A-6). The groups of picketers ranged in size from eleven to more than forty persons, and they picketed on at least six different occasions during the one-month period (Jurisdictional Statement at A-6).

Dr. Victoria's home, at 750 North Briarridge Drive, is in the Black Forest Subdivision of the Town of Brookfield, Wisconsin. The zoning in the subdivision is exclusively single family residential (Jurisdictional Statement at A-6). All of the residential streets in Brookfield are approximately thirty feet wide, sufficient for one vehicle in each direction; there are no sidewalks (Jurisdictional Statement at A-6).

The Town of Brookfield is a residential suburb of the City of Milwaukee. It has a

population of approximately 4,300 people, and an area of 5-1/2 square miles (Jurisdictional Statement at A-6).' Considerable business and commercial development is clustered along West Bluemound Road (State Highway 18); the remainder of the Town is residential (JA-49).

The picketing spawned numerous complaints and reports to the town's police department. Residents of the neighborhood told police that their children had been frightened by picketers' statements that there was "a man up the road who kills babies"; that they found the picketing an annoying disturbance and a public nuisance; and that they worried that real estate values and sales would be affected (JA-50 to JA-52). Dr. Victoria's family reported that the pickets had trespassed on their property in order to tie red ribbons on the house and shrubbery, and that their car had been blocked from entering the driveway (JA-51 to JA-52).

On May 7, 1985, the Brookfield Town Board enacted an ordinance that prohibited all

picketing in residential areas except labor picketing. The ordinance never was enforced because appellant Town Attorney Clayton Cramer determined that it was probably unconstitutional under Carey v. Brown, 447 U.S. 455 (1980). The Town Board repealed the ordinance and passed, on May 15, 1985, a substitute ordinance that declared simply, "[i]t is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., General Code, Ordinance § 9.17 (1985) (Jurisdictional Statement at A-28). Appellees have refrained from picketing since the effective date of the ordinance, May 21, 1985 (Jurisdictional Statement at A-10).

Picketers Schultz and Braun filed a complaint under 42 U.S.C. § 1983, seeking declaratory and preliminary and permanent injunctive relief from an alleged deprivation of their rights under the first and fourteenth amendments of the United States Constitution

(JA-1). The district court heard the picketers' motion for a preliminary injunction on August 13, 1985. The Town argued in its brief that the ordinance is content-neutral and was enacted to promote the Town's interests in preserving the tranquility and privacy of the home and neighborhood, as well as public safety. The district court granted a preliminary injunction on October 7, 1985 (Jurisdictional Statement at A-22). The court held that the ordinance was likely to fail the test of a constitutional time, place and manner regulation of speech in a public forum (Jurisdictional Statement at A-23). The court's order provided that the preliminary injunction would become a permanent injunction if the Town did not appeal and if neither party requested a trial within sixty days (Jurisdictional Statement at A-23).

The Town appealed to the Seventh Circuit Court of Appeals, and argued in its brief that the ordinance does not violate the first and fourteenth amendments of the Constitution

because it is a content-neutral, time, place and manner regulation; it is narrowly tailored to serve a significant governmental interest, and it leaves open ample alternative channels of communication. A panel of the court of appeals heard the case on April 9, 1986, and affirmed the district court, with Judge Coffey dissenting (JA-85). The court of appeals then granted appellants' motion for rehearing, and the full court heard the case on April 29, 1987. The decision and order of the court of appeals affirmed the district court order by an evenly divided court without opinion, and remanded the case for any further proceedings deemed necessary (Jurisdictional Statement at A-1).

SUMMARY OF ARGUMENT

The district court in this case granted the picketers a preliminary injunction that enjoined the enforcement of Brookfield's residential picketing ordinance. The court considered facts presented by the parties by way of proposed statements of fact and

affidavits; the parties disputed only the details of the picketers' behavior. The court granted a preliminary injunction, but, based on the evidence before it, would have granted a permanent injunction had the Town not appealed and asked for a trial. The court of appeals affirmed the district court, and remanded the case for "any further proceedings deemed necessary." Under these circumstances, this court has appellate jurisdiction because the judgment of the district court, in effect, was final, and no purpose would be served in returning the case to that court for trial.

Brookfield's picketing ordinance affects one type of expressive behavior that has occurred on its narrow residential streets. Streets such as these, only thirty feet wide with no sidewalks, have not traditionally, or by government designation, been used for picketing. Therefore, they are a "nonpublic forum," and the constitutionality of the ordinance should be evaluated using the

appropriate standard. That standard requires that the ordinance be reasonable and not an effort to suppress expression just because the public officials oppose the speakers' views. Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 806 (1985). Brookfield's ordinance is reasonable and was not enacted in order to suppress the picketers' particular viewpoint.

In the event that the Court views Brookfield's residential streets as a traditional, full public forum rather than a nonpublic forum, the ordinance also meets the requirements of a constitutional time, place, and manner regulation of speech. These requirements are that the ordinance be content neutral, promote significant governmental interests, be narrowly tailored, and leave open ample alternative channels of communication. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The ordinance disallows groups with all points of view from picketing in

residential areas, and so is content neutral. Cf. Carey v. Brown, 447 U.S. 455 (1980).

Brookfield's purpose in enacting the ordinance was to protect the safety and privacy of its residents. Because the residential streets of Brookfield are narrow and without sidewalks, picketers walking or standing on them pose a danger to themselves and others. Picketers also disturb the privacy of Brookfield residents in their homes. These safety and privacy concerns are significant governmental interests that are promoted by the ordinance.

The residential picketing ordinance is narrowly drawn to restrict only the activity that would cause safety problems and invasion of privacy. Only picketing is restricted, and only in residential areas. An ordinance that was more limited, for example that restricted picketing by time of day or season, could be unconstitutional, see City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986), aff'd, ___U.S.___, 107 S. Ct.

919 (1987), and would not adequately advance Brookfield's legitimate interests.

Protesters in Brookfield are allowed to protest in many ways other than picketing in residential areas. They may distribute literature, make phone calls or enter the neighborhood alone or in groups. In addition, protesters may engage in all peacful forms of protest, including picketing, in the commercial areas of the Town. Ample alternative channels of communication therefore exist.

Finally, the ordinance is not overbroad. It is not susceptible to an overbreadth challenge because there is no realistic danger that it will significantly compromise the free speech rights of parties not before the Court. See Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984). Other methods of expression are available in residential areas, and all peaceful methods of expression may be carried out in commercial areas of the Town.

In addition to the arguments contained herein, the Town adopts by reference the dissenting opinion of Judge Coffey to the withdrawn Seventh Circuit panel decision (see JA-148 to JA-207).

ARGUMENT

I. Because the District Court Made a Final Decision on the Constitutionality of Brookfield's Residential Picketing Ordinance, and the Court of Appeals Affirmed, this Court has Appellate Jurisdiction.

Appellants respectfully submit that the court has appellate jurisdiction in this case under 28 U.S.C. § 1254(2). The judgment of the lower court must be final in order for this Court to have appellate jurisdiction. Slaker v. O'Connor, 278 U.S. 188, 189-90 (1929); McLish v. Roff, 141 U.S. 661, 665-66 (1891). The Court in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S. Ct. 2169 (1986), recently put to rest questions about the validity of this rule in the situation "where a case is remanded for further development of the facts." 106 S. Ct. at 2176. In that case the district court ordered the parties to submit a stipulation of uncontested facts, which was used solely to determine the plaintiffs' motion for a preliminary injunction, "without

prejudice to any party's right to controvert any facts or to prove any additional facts at any later proceeding . . ." in the action. 106 S. Ct. at 2174. The district court concluded that, with one exception, the plaintiffs had failed to establish a likelihood of success on the merits, and so were not entitled to a preliminary injunction. Id. On appeal, the court ruled that various portions of the state statute at issue were unconstitutional, and that the validity of other provisions might depend on evidence adduced at trial or on procedural rules to be promulgated by the state supreme court. The court remanded these portions of the case to the district court. 106 S. Ct. at 2175. Under these circumstances, this Court held it had no appellate jurisdiction under § 1254(2), 106 S. Ct. at 2176.

The situation in the case at bar is significantly different than that in Thornburgh. The district court did not require a stipulation of uncontested facts, but

considered facts from each party. Specifically, the district court considered the facts contained in plaintiffs' proposed statement of the facts; defendant's proposed statement of the facts; the Town of Brookfield residential picketing ordinance; various other Town of Brookfield ordinances concerning obstructing streets and sidewalks, unnecessary noise, destruction of property, littering, criminal trespass, and disorderly conduct; a plat map of the subdivision where the picketing occurred; a story and accompanying photograph from the May 21, 1985, edition of the Milwaukee Sentinel; and fifteen affidavits that make up part of the Joint Appendix (Jurisdictional Statement at A-4, A-5, A-9; see Ja-18 to JA-84). The only disputed facts concerned the details of the picketers' behavior; the fact of their picketing was not disputed, and neither party believed an evidentiary hearing was necessary (see JA-16 to JA-17). In addition, the court considered the arguments of counsel (Jurisdictional

Statement at A-5). The court was fully informed, and would have granted plaintiffs a permanent injunction without hearing additional evidence, had defendants not appealed and requested a trial (Jurisdictional Statement at A-22, A-23).

Defendants did appeal, and the Seventh Circuit Court of Appeals, without opinion, affirmed the district court's judgment and returned the case to the district court "for any further proceedings deemed necessary" (Jurisdictional Statement at A-1). Because the district court was willing to enter a permanent injunction based on the evidence presented at the hearing, it is unlikely that "further proceedings" would be "deemed necessary" by that court.

This case is one in which the Court may find that the finality requirement is satisfied in light of the facts. See Thornburgh, 476 U.S. at ___, 106 S. Ct. at 2175. In City of New Orleans v. Dukes, 427 U.S. 297 (1976),

the court of appeals reversed the district court, and held an ordinance unconstitutional as applied and remanded the case to the district court to determine the severability of a clause of the ordinance. Id. at 301. This Court nevertheless held that the finality requirement was met under the facts of the case. Id. at 302. The constitutional issues were fully adjudicated in the court of appeals and only a state law question remained to be determined on remand. Id. The Court stated that the policy underlying § 1254(2), which is to ensure that state laws are not erroneously invalidated, would not be served by further delay in deciding the constitutional issue. Id. Thus this Court held it had appellate jurisdiction in the case. Id. at 303.

The case at bar likewise should be considered final, despite the remand order. No purpose would be served by the district court conducting a trial to determine whether to grant a permanent injunction. That court already had determined it would grant a

permanent injunction, based on the evidence before it, and a trial would merely delay the determination of important constitutional issues. Appellants therefore submit that the decision appealed from is final and that this Court has appellate jurisdiction under 28 U.S.C. § 1254(2).

In the event the Court does not find appellate jurisdiction, appellants respectfully request the Court to treat the Jurisdictional Statement as a petition for writ of certiorari, and grant certiorari under 28 U.S.C. § 2103.

II. The Narrow Residential Streets of the Town of Brookfield are a Nonpublic Forum, and the Residential Picketing Ordinance is a Reasonable Regulation of Speech.

The district court assumed that the residential streets of the Town constituted a traditional, full, public forum. That assumption is based upon the frequently stated, but never examined conclusion that "streets . . . 'have immemorially been held in trust for the use of the public, and, time out of mind, have

been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Haque v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939); quoted in Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The Town submits, with all due respect, that the question of whether its residential streets are a full public forum is not sufficiently addressed by this statement.

It is submitted that the question of the actual forum status of a given residential street or cul-de-sac has never been precisely presented to this Court. That argument is now advanced. Perry acknowledged that the very existence of the "right to access to public property, and the standard by which limitations on such right must be evaluated, differs depending on the character of the property at issue." Id. at 44. Brookfield submits that its residential streets are not traditional or dedicated, full, public fora for all forms of expression.

The district court applied the 'full-forum' test, mentioned in Perry and discussed infra, to the ordinance. Perry also noted an alternative status of a nonpublic forum, however; "[p]ublic property which is not by tradition or designation a forum for public communication. . . ." Id. at 46. It has never even been established in this case that the residential streets in question are owned by the government. Moreover, this Court has:

> recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Perry, 460 U.S. at 46 (citations omitted). The residential streets in question have never been held open, by tradition or designation, to all members of the general public to congregate upon, regardless of their own place

of residence and lack of business or social purpose for being there. Hence, the inquiry must turn to whether such strangers are allowed to enter and remain for the precise purpose of picketing. In this regard, it is observed that the mere fact that an instrumentality is used for the communication of ideas does not make it a public forum. Perry, 460 U.S. at 49, n.9.

In Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985), this Court viewed the relevant forum as a charity drive, rather than the governmental premises upon which it was held. Id. at 801. The principle thus appears to be that the relevant forum involves participation in a certain activity rather than merely the place in which it transpires. This explains the basis for the forum analysis in Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984). The court there examined whether a particular form of expression is

inappropriate for, or incompatible with, the character of the property and its intended use. Id. at 773. Thus, in that case it was held that public areas in a commuter train station did not constitute a public forum. Id. Likewise, in Trenouth v. United States, 764 F.2d 1305 (9th Cir. 1985), the court held a truck parking area not to be a public forum. Id. at 1309.

As this 'activity' analysis has been applied most analogously to date, Pennsylvania Alliance for Jobs and Energy v. Council of Munhall, 743 F.2d 182 (3d Cir. 1984), held that door-to-door canvassing of private homes is plainly not a public forum. Id. at 187. "Indeed, the Supreme Court has noted that, because of the countervailing privacy interests of householders, [o]f all the methods of spreading unpopular ideas, house to house canvassing seems the least entitled to extensive protection." Id. at 186 (citations omitted). Because of identical privacy interests of householders here, and of their

interests in safety as well, residential picketing is likewise least entitled to extensive protection as speech.

Most directly, ACORN v. City of Phoenix, 603 F. Supp. 869 (D. Ariz. 1985), aff'd, 798 F.2d 1260 (9th Cir. 1986), held streets not to be a traditional public forum for purposes of soliciting donations. Id. at 871. The court held that, given traffic considerations, a full public forum did not exist in an intersection. Id. The court observed that "[t]he cases cited . . . refer to 'streets' as public forums, typically in the context of sidewalks and other locales traditionally reserved for public communication." Id. at 870 (emphasis supplied). It should be observed again that the residential streets here have no sidewalks, nor any area at all "traditionally reserved for public communication."

Likewise, this Court in Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984), held that sidewalks, crosswalks, curbs, lampposts, hydrants, trees,

shrubs, and other various items of public property in public rights-of-way did not constitute a public forum at all. Id. at 814. In examining the matter, the Court noted the city's power to improve its appearance, and stated that "the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." Id. Here, as well, Brookfield retains its right to provide for residential privacy, tranquility and safety, goals more fundamental than aesthetic. Because it does not appear that the residential streets have ever been used for picketing, they are not a public forum for that purpose. Cf. Student Coalition for Peace v. Lower Merion School Dist., 596 F. Supp. 169 (E.D. Pa. 1984) (aff'd in part, vacated in part, 776 F.2d 431 (3d Cir. 1985) (school facilities, which never had been used for political speech, were nonpublic forums).

Because no traditional picketing forum thus exists, the applicable standard of review

of the anti-residential picketing ordinance herein is whether it is 1) reasonable; and 2) not an effort to suppress expression just because the public officials oppose the speaker's views. Cornelius, 475 U.S. at 806; Vincent, 466 U.S. at 789. The latter is clear; and, indeed, no such animus was alleged here. As to reasonableness, it is submitted on the strength of the foregoing facts and argument and the following observations that the regulation was not only reasonably authorized by the circumstances, it was absolutely required. Under this test, there is no requir ient that restrictions of access be narrowly tailored or that the government's interest be substantial, although, as will be seen infra, both were the case here.

III. Assuming Brookfield's Residential Streets Constitute a Full Public Forum, The Residential Ordinance Is A Constitutional Time, Place and Manner Regulation Of Speech.

A time, place, and manner regulation of speech in a public forum, such as a public street, is constitutional if it passes the

test laid out in Perry Education Association v. Perry Local Educator's Ass'n, 460 U.S. 37 (1983). The regulation must be 1) content neutral, 2) designed to advance a significant governmental interest, 3) narrowly tailored to promote that significant governmental interest, and 4) leave open ample alternative channels of communication. Id. at 45.

A. The Ordinance Does not Ban Picketing Based on the Point of View of the Picketers, so is Content Neutral

The district court correctly concluded that the ordinance is content neutral (Jurisdictional Statement at A-17). The ordinance bans picketing in residential areas to promote any point of view. An earlier version of the ordinance would have barred all residential picketing except labor picketing, but that version was repealed based on this Court's decision in Carey v. Brown, 447 U.S. 455 (1980). In that case, the Court held that a residential picketing ordinance that expressly excepted labor picketing violated the equal protection clause of the Constitution. Id. at

471. The picketers allege that an implied exception for labor picketing nevertheless must be read into Brookfield's ordinance because of a state law, Wis. Stat. § 103.53(1)(e), (g), (1), which authorized certain types of labor picketing. If the ordinance allows labor picketing in residential areas, but disallows other types of picketing, the Equal Protection Clause of the Constitution is violated, according to the picketers. The Carey court expressly reserved judgment on whether an ordinance, like Brookfield's, that barred all residential picketing regardless of subject matter was unconstitutional, however. Id. at 459, n.2. In addition, the legislative history of Brookfield's ordinance shows the intent to avoid the problems with the Carey ordinance. Finally, the issue of whether implied exception for labor picketing must be read into the ordinance is a question of construction of state law, and is more appropriately addressed by the state courts.

Because Brookfield's ordinance does not favor or disfavor speech of any particular point of view, the ordinance is content neutral.

B. The Ordinance Promotes the Significant Interests of the Town of Brookfield of Protecting the Privacy and Safety of its Residents

The interests the Town of Brookfield seeks to advance by the ordinance are public safety and privacy (Jurisdictional Statement at A-26 to A-27). These are significant interests, as the district court correctly concluded (see Jurisdictional Statement at A-18). Maintaining the safety of public streets is clearly one of the responsibilities of a municipality. Streets in residential Brookfield are only thirty feet wide, and there are no sidewalks. Picketers walking on the street undoubtedly place themselves in danger from passing vehicles. This would be particularly true if, as in this case, the picketers parked cars and buses on the street. Other pedestrians using the street also would be endangered because drivers would become

distracted by the picketers. Vehicular traffic would be interfered with as well.

Brookfield's restriction of picketing on residential streets is intended to prevent these problems and aid in carrying out the Town's duty. Even in traditional public forums, restrictions on speech are permitted to promote public safety. In Cox. v. Louisiana, 379 U.S. 536 (1965), this Court stated that a restriction to control travel on public streets, "designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right, which, in other circumstances, would be entitled to protection." Id. at 557.

An equal, if not more important, government interest advanced by the ordinance is privacy. The district court correctly found that protecting the privacy of the home is a significant enough interest to justify regulation of speech (See Jurisdictional

Statement at A-18). This Court has recognized that:

> [p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual to "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick."

Carey v. Brown, 447 U.S. at 471 (quoting Gregory v. City of Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

Maintaining safety and privacy can be seen as "'preserv[ing] the quality of urban life,'" which is an interest that "'must be accorded high respect.'" City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)) (upholding zoning ordinance that prohibited adult movie theaters from locating within 1000 feet of a residential area, church, park or school). By enacting an ordinance to protect the safety and privacy of its residents, Brookfield is promoting significant govern-

mental interests, and this element of a constitutional time, place, and manner regulation is met.

C. The Ordinance Restricts Only the Necessary Amount of Expression to Advance Brookfield's Interests, so is Narrowly Tailored

It is well settled that picketing is the type of conduct that may be regulated by a narrowly drawn statute. See Cox v. Louisiana, 379 U.S. 559, 563 (1965). In contrast to its findings on the issues of content neutrality and significance, the district court erred in its determination that Brookfield's residential picketing ordinance is not narrowly tailored. The district court did not specify the standard it used in analyzing this element, but the correct standard was articulated by this Court in Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). In its analysis of the constitutionality of a city ordinance that prohibited posting signs on public property, the Court stated that "the city did no more than eliminate the exact

source of the evil [visual blight] it sought to remedy." Id. at 808. The Court contrasted the ordinance with the one found unconstitutional in Schneider v. New Jersey, 308 U.S. 147 (1939), which prohibited all handbilling on streets as a way to reduce litter:

> With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In Schneider, an antilittering statute could have addressed the substantive evil without prohibiting expressive activity, whereas application of the prophylactic rule actually employed gratuitously infringed upon the right of an individual to communicate directly with a willing listener. Here, the substantive evil - visual blight - is not merely a possible by-product of the activity, but is created by the medium of expression itself. In contrast to Schneider, therefore, the application of the ordinance in this case responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

Vincent, 466 U.S. at 810.*

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* The Second, Seventh and Eighth Circuit Courts of Appeals have adopted a different standard in analyzing the "narrowly tailored" element of the test of a time, place, and manner regulation of speech. Those courts require that a regulation be the "least

Brookfield's ordinance likewise "curtails no more speech than is necessary to accomplish its purpose." The evils the Town is attempting to prevent are unsafe streets and invasion of residential privacy. The medium of expression -- picketing -- creates these evils, as discussed supra. Picketing is not defined in the Brookfield ordinance, but a generally accepted definition is: "to walk or stand in front of as a picket . . ." Webster's Third International Dictionary 1710 (1961). A "picket" is defined as "a person posted by a

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restrictive" means of restricting speech that will serve the governmental objective. See City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986), aff'd, ___ U.S. ___, 107 S. Ct. 919, 920 (1987); Ass'n of Community Organizations for Reform Now v. City of Frontenac, 714 F.2d 813 (8th Cir. 1983); New York City Unemployed and Welfare Council v. Brezenoff, 677 F.2d 232 (2d Cir. 1982). However, this Court has stated that "[t]he less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation." Regan v. Time, Inc., 468 U.S. 641, 652 (1984); see also City of Watseka v. Illinois Public Action Council, ___U.S.___, 107 S. Ct. 919, 920 (1987)(White, J., dissenting).

labor organization at an approach to the place of work affected by a strike . . .; also: one posted similarly in a demonstration as a protest against a policy of government." Id. See also 48A Am. Jur. 2d Labor and Labor Disputes § 2051 (1979). Persons engaged in this sort of activity in residential areas, especially where there are no sidewalks, create a threat to safety and an invasion of the privacy of homes.

The amount of speech curtailed is small; only picketing is prohibited, while many other forms of expression, as discussed infra, are allowed. The complete ban on residential picketing is necessary to advance Brookfield's purposes. Even one picket is an unacceptable intrusion into the privacy of the person whose home is being picketed:

> Unlike sound trucks, it is not just the distraction of the noise which is in issue - it is the very presence of an unwelcome visitor at the home. As a Wisconsin court described in Wauwatosa v. King, 49 Wis. 2d 398, 411-412, 182 N.W.2d 530, 537 (1971):
>
> "To those inside . . . the home becomes something less than a home when and while

> the picketing . . . continues[s]. . . . [The] tensions and pressures may be psychological not physical, but they are not, for that reason less inimical to family privacy and truly domestic tranquility."
>
> Whether noisy or silent, alone or accompanied by others, whether on the streets or on the sidewalk, I think that there are few of us that would feel comfortable knowing that a stranger lurks outside our home.

Carey v. Brown, 447 U.S. at 478-79 (Rehnquist, J., dissenting). Picketing also disturbs the privacy of neighbors and family members of the picketed person, making it an especially intrusive form of expression. Furthermore, even a single picket could distract motorists and be a hazard to himself and others.

The district court suggested that the ordinance could be narrowed by limiting the time of day during which picketing could occur, or by placing a seasonal restriction on the activity (Jurisdictional Statement at A-19). Privacy and safety would suffer no matter what time of day or year the picketing occurred, however. In addition, ordinances restricting the time during which speech

activities can be carried out in neighborhoods have been found unconstitutional. See City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986), aff'd, ___U.S.___, 107 S. Ct. 919, 920 (1987)(ordinance limiting door-to-door soliciting to the hours between 9:00 a.m. and 5:00 p.m. Monday through Saturday unconstitutional); Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1259 (7th Cir. 1985)(ordinance prohibiting door-to-door soliciting between 8:00 p.m. and 8:00 a.m. unconstitutional as applied to the hour between 8:00 p.m. and 9:00 p.m.). A seasonal restriction also would not advance Brookfield's interests sufficiently. While picketing could be more dangerous during the winter because of slippery streets and obstructed vision, it would be more disruptive of tranquility during the summer because of open windows and residents out of doors.

Finally, the Town of Brookfield has the responsibility to protect its citizens from unwanted and dangerous intrusions into their

lives. "It is the [municipality], not this Court, which legislates to prohibit evils which its citizens find unescapable, subject only to the limitations of the United States Constitution." Carey v. Brown, 447 U.S. at 478 (Rehnquist, J., dissenting). The Town has determined that a ban on residential picketing is the only way to protect the safety and privacy of its citizens, while still allowing the protesters other methods of expressing their views.

Brookfield's purpose in enacting the ordinance was to eliminate only those oppressive activities that disrupt safety and privacy, and only in residential areas. The Town accomplished its purpose by enacting this narrowly drawn ordinance, which passes the narrowly tailored test required of a constitutional time, place, and manner regulation.

D. The Ordinance Allows Numerous Other Types of Expressive Activity, so Leaves Open Ample Alternative Channels of Communication

The final element of the four-part test of a time, place, and manner regulation requires that the regulation allow ample alternative channels of communication. The district court did not determine whether this element had been met because of its decision that the ordinance was not narrowly tailored. Nevertheless, the picketers here do have ample alternative means by which to communicate their message to the public.

The ordinance prohibits only picketing, defined as standing or patrolling, in residential areas of Brookfield. Protesters have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching, see Gregory v. City of Chicago, 394 U.S. 111, 112 (1969). They may go door-to-door to proselytize their views. They may distribute literature in this manner, see Martin v. City of Struthers, 319

U.S. 141, 143 (1943), or through the mails. They may contact residents by telephone, short of harassment. They are barred only from picketing in residential areas, due to the uniquely invasive and potentially dangerous nature of that particular conduct.

The picketers in this case have not shown that they have a particular need to picket in residential areas. See Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) ("nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication . . ."). They may picket or engage in other forms of peaceful protest in commercial areas of Brookfield. The availability of other forums is a "highly relevant factor in determining the appropriate balance" between speech interests and other substantial governmental interests. Carey v. Brown, 477 U.S. 455, 482, n. 3 (Rehnquist, J., dissenting).

Like the municipality in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), which limited the area in which adult theaters could operate, the Town here has given the picketers a "reasonable opportunity" to express their views. See Renton, 475 U.S. at 54. In that case, the Court went so far as to state that "the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city. . . ." Id. (emphasis added). Brookfield's residential picketing ordinance cannot be said to deny protesters a reasonable opportunity to communicate their views within the Town. They may use methods other than picketing to protest in residential areas, and all peaceful methods to protest in other areas. The ordinance leaves open ample alternative channels of communication, thus it meets all four of the requirements of a constitutional time, place, and manner regulation of speech.

IV. The Residential Picketing Does Not Significantly Compromise Free Speech Rights of Parties Not Before the Court, so the Ordinance is Not Overbroad

The district court did not reach the alternative argument of the picketers that the residential picketing ordinance is unconstitutionally overbroad. Nevertheless, it is appropriate to discuss that argument in general defense of the constitutional validity of the ordinance.

This Court has stated that, particularly if conduct and not merely speech is involved, "the over-breadth of a statute must not only be real, but substantial as well." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); see also Board of Airport Comm'rs v. Jews for Jesus, Inc., ___U.S.___, ___, 107 S. Ct. 2568, 2571 (1987); Members of the City Council v. Taxpayers for Vincent, 466 U.S. at 799-801; New York v. Ferber, 458 U.S. 747, 770-71 (1982). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it

susceptible to an over-breadth challenge." Vincent, 466 U.S. at 800. Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Id. at 801.

The type of speech restriction that has been held overbroad is found in Board of Airport Comm'rs v. Jews for Jesus, Inc., ___U.S.___, 107 S. Ct. 2568 (1987). In that case the Board of Airport Commissioners adopted a resolution that prohibited all First Amendment activities at Los Angeles International Airport. 107 S. Ct. at 2570. This absolute prohibition of speech would have reached activities by respondents in the case, who had distributed religious literature, but also activities such as talking, reading, and wearing campaign buttons. Id. at 2572. "[V]irtually every individual who [entered the airport could] be found to violate the resolution by engaging in some 'First

Amendment activit[y].'" Id. The resolution therefore violated the overbreadth doctrine. Id. at 2571.

The Town of Brookfield's residential picketing ordinance is in no way as restrictive as the resolution in Board of Airport Commissioners. As discussed supra, the only speech activity that is restricted is picketing; other expressive activities are allowed. And the only area of the Town where even picketing is disallowed is the residential area. Picketing, as well as all other expressive activities, is allowed in the commercial area.

No doubt one could imagine an application of Brookfield's residential picketing ordinance that would be an impermissible restriction of speech. The Eighth Circuit Court of Appeals in Pursley v. City of Fayetteville, 820 F.2d 951 (8th Cir. 1987), did just that when it examined an ordinance similar to Brookfield's, and determined that it was overbroad. Id. at 957. The court stated that

because residences are "often located close to the hubbub of daily commerce," the ordinance, which prohibited demonstrations and picketing "before or about the residence or dwelling place of any individual," could prohibit picketing in busy commercial areas. Id. at 956. That result would not advance the city's goals of protecting its citizens' peace at home, according to the court. Id. A similar problem would not arise in Brookfield. The town is segregated into residential and commercial areas, with the commercial area located along State Highway 18. The ordinance would not prohibit picketing in the commercial area, and would advance the Town's goals of preserving residential privacy and safety.

In addition, ordinances and statutes "should not be deemed facially invalid unless [they are] not readily subject to a narrowing construction by the state courts." Ernoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975). The Pursley court failed to consider the possibility of a state court narrowing the

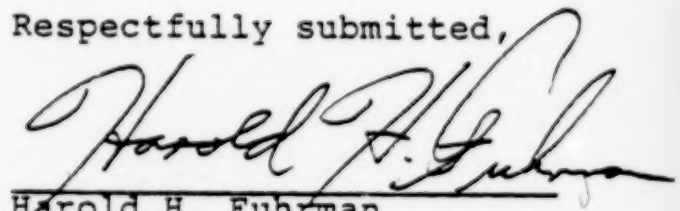
construction of the ordinance if a situation ever arose that required such action. See id. at 958 (Gibson, J., dissenting). The Brookfield ordinance also could be narrowed by a state court if necessary. However, any narrowing of the ordinance as it is written, for example by limiting the number of picketers or the time of picketing, would not advance Brookfield's legitimate goals of protecting the safety and privacy of Brookfield residents, as discussed earlier.

Brookfield's residental picketing ordinance is not so broad that there is "a realistic danger that [it] will significantly compromise recognized First Amendment protections of parties not before the Court," see Vincent, 466 U.S. at 800, and therefore an overbreadth challenge is inappropriate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,



Harold H. Fuhrman

George A. Schmus

Attorneys for Appellants

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